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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY WILLIAM AVILLA,

Defendant and Appellant.

H040750

(Santa Clara County

Super. Ct. No. C1113533)

Defendant Troy William Avilla stole three sandwiches, a bottle of soda, a bag of chips, and Kool-Aid packets from a Safeway grocery store on August 23, 2011. He was approached by two men in plain clothes—“loss prevention associates” working at the Safeway—just outside the store. The loss prevention associates testified they identified themselves; Avilla testified he was not immediately aware of the men’s affiliation with the store. An altercation ensued, during which Avilla pushed one loss prevention associate, who responded by kicking Avilla. The second loss prevention associate tried to restrain Avilla in a bear hug. Avilla pulled out a pocket knife and the loss prevention associates released him. Avilla threatened to stab the men and then walked away, taking the stolen items. The loss prevention associates and a bystander, Anthony Tutone, followed Avilla until police arrived to arrest him.

A jury convicted Avilla of two counts of second degree robbery (Pen. Code, §§ 211-212.5, subd. (c), counts 1 and 2)<sup>1</sup>; one count of assault with a deadly weapon

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

(§ 245, subd. (a)(1), count 3); two counts of threats to commit a crime resulting in death or great bodily injury (§ 422, counts 4 and 5); and one count of second degree burglary (§§ 459-460, subd. (b), count 6). Following a trial, the court found true allegations that Avilla had three prior strike convictions (§§ 667, subd. (b)-(i), 1170.12) and a prior serious felony conviction (§§ 667, subd. (a), 1192.7). The court sentenced Avilla to a term of 25 years to life in prison plus a consecutive term of five years on the prior serious felony conviction.

On appeal, Avilla asserts claims of prosecutorial misconduct, instructional error, insufficient evidence, violation of section 654, sentencing error, and ineffective assistance of counsel. We reverse the judgment and remand for resentencing.<sup>2</sup>

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. Defendant is Charged***

A felony complaint was filed against Avilla on August 26, 2011. On April 5, 2012, following a preliminary hearing, the Santa Clara County District Attorney filed an information charging Avilla with two counts of second degree robbery (§§ 211-212.5, subd. (c)) for taking groceries from the two loss prevention associates, Daniel Trevino and Crisostomo Unciano. The information also charged Avilla with two counts of assault with a deadly weapon (§ 245, subd. (a)(1)) against Unciano and Tutone and three counts of threats to commit a crime resulting in death or great bodily injury (§ 422) against Trevino, Unciano, and Tutone. The information alleged Avilla had three prior strike convictions (§§ 667, subd. (b)-(i), 1170.12) and a prior serious felony conviction (§§ 667, subd. (a), 1192.7).

An amended information filed on July 15, 2013 dropped the charges related to Tutone and added one count of commercial burglary.

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<sup>2</sup> Avilla also has filed a petition for writ of habeas corpus, which we resolve by separate order.

***B. Evidence Adduced at Trial***

The case proceeded to trial in July 2013. The jury heard approximately one and a half days of testimony, during which the following evidence was adduced.

***1. Loss Prevention Associate Trevino***

Trevino testified for the prosecution that he works for a security company as a loss prevention associate. Loss prevention associates wear plain clothes, not uniforms, so as not to be observed by would-be shoplifters.

On August 23, 2011, while assigned to a Safeway in San Jose, Trevino observed a man place three sandwiches, a bottle of Coke, and a bag of chips into a shopping cart. The man, who Trevino identified in court as Avilla, also put a handful of Kool-Aid packets in his pocket. Avilla transferred the items from the shopping cart to a backpack and exited the store without paying. Trevino testified that he put his badge around his neck as he followed Avilla out of the store. The badge was a silver star that read “Security Officer.”

Outside the store, Trevino yelled “loss prevention.” Avilla turned and looked at Trevino, who held up his badge. Avilla immediately pushed Trevino away; this was the first physical contact between the two, according to Trevino. Trevino’s partner, Unciano, arrived on the scene and tried to restrain Avilla in a bear hug. Trevino saw Avilla pull a knife out of his pocket. Trevino yelled “knife” and he and Unciano backed off. Avilla said, “back up or I’ll fucking stab you.” He was about three or four feet away from Trevino and Unciano, whose backs were against the soda machines outside the store.

Avilla walked away through the parking lot, still holding the knife. As he did so, Trevino called the police on his cell phone. Once Avilla was a couple hundred feet away, Trevino and Unciano began following him so they could inform the police of his whereabouts. Trevino observed Avilla remove the stolen items from his backpack and leave them in the street near a Walgreens. Trevino also observed “some random male run[] up, and almost like he’s acting like a vigilante,” follow Avilla with a rock in his

hand. Trevino opined that the man “saw what happened” and was trying to get involved. Eventually, the police arrived and took Avilla into custody.

Trevino testified that he never saw Avilla try to stab anyone with the knife, including himself, Unciano, or the man with the rock.

Safeway surveillance video showing the encounter between Avilla, Trevino, and Unciano was shown to the jury.

On cross-examination, Trevino acknowledged trying to grab the backpack from Avilla and kicking Avilla before Avilla pulled the knife.

2. *Loss Prevention Associate Unciano*

Unciano testified that on August 23, 2011 he was working in loss prevention at a Safeway. His partner, Trevino, alerted him that someone was stealing from the store. Unciano ran outside where he heard Trevino identify himself and saw him flash his badge. Unciano then saw the suspect, who he identified in court as Avilla, push Trevino. Unciano testified that he yelled “security” as he bear hugged Avilla from behind. Avilla resisted and the two struggled, knocking into a soda machine. Trevino yelled “knife, knife, knife,” at which point Unciano released Avilla. According to Unciano, Avilla swung the knife from right to left in his direction, the blade coming within two-and-a-half or three feet of Unciano’s torso. Avilla also verbally threatened to kill Unciano.

3. *Police Officer Marconet*

Marconet, a volunteer police officer with the San Jose Police Department, testified that at approximately 5:00 p.m. on August 23, 2011, he and his partner responded to a disturbance call near a San Jose Safeway. When Marconet encountered Avilla, he saw Avilla put something in his pocket. Avilla complied with Marconet’s instruction to lay on the ground. Marconet arrested Avilla. During a search of Avilla’s person, Marconet found a knife and several Kool-Aid packets. A cell phone also was on Avilla’s person at the time he was booked into the jail.

#### 4. Avilla

Avilla took the stand in his own defense. He acknowledged that he was convicted of giving a false name to a police officer in 1997, possession of a destructive device and felon in possession of ammunition in 2001, and filing a false police report in 2010.

Avilla testified that at about 5:00 p.m. on August 23, 2011 he was in a Safeway deciding whether or not to steal food because he was hungry. He placed a sandwich and a soda in his cart and put some Kool-Aid in his pocket. While he was in the store, he answered a call from a friend, David Harbold, on his cell phone. Avilla spoke to Harbold through a Bluetooth device while holding the phone in his hand.

Avilla testified that he exited the store with food he acknowledged was stolen while still talking on the phone. Outside the store, he heard a loud noise and a man grabbed him. Avilla pushed the man away and the man kicked him in the groin. Another man then grabbed Avilla from behind. The men were yelling but Avilla did not know what they were saying, as he still had Bluetooth devices in both ears. He did not immediately recognize the men as loss prevention. Avilla pulled his knife because he “didn’t know what was going on and they were attacking [him] and . . . [he] wanted to defend [himself].” Avilla testified that he never tried to stab anyone.

Once Avilla pulled the knife, the men released him and stepped back. At that point, one of the men displayed what “seemed to be a badge” and said that he was loss prevention. Avilla answered “yes” in response to the question “[t]hat’s when you became aware of the fact that these two individuals . . . were not just random people, they were loss prevention?” However, immediately thereafter, he testified that he merely became aware the men “*could have been*” loss prevention, stating that he still “didn’t really know that they were loss prevention [because he had] never seen loss prevention kick people in the groin before” so he “just wanted to get away from the situation.” On cross-examination, Avilla acknowledged that, after pulling the knife, he saw Trevino’s badge and had “an idea” and an “inkling” the men were loss prevention associates.

Avilla grabbed his bag and left. He placed the sandwich and soda on the ground as he walked away in an effort to return the stolen items, but forgot about the Kool-Aid in his pocket.

Avilla testified that his Bluetooth device was taken and placed in a plastic bag with his cell phone when he was booked into jail. On cross-examination, he acknowledged that the Bluetooth was not listed on the jail property sheet and that he never mentioned being on the phone to police officers. The prosecutor asked Avilla whether he had ever told him (the prosecutor) about the Bluetooth device. Avilla responded, "I've never had a conversation with you about this, sir." Later, the prosecutor asked Avilla, "Is it fair to say to this date, at this moment I still have never heard of David Harbold or what his phone number is and neither has [sic] the officers?" Avilla answered, "My attorney has."

5. *Private Investigator Carrillo*

Carrillo, a private investigator employed by the defense, testified that she retrieved Avilla's property from the jail in September 2012. Among the property she retrieved was a cell phone and a Bluetooth headset. On cross-examination, the prosecutor asked Carrillo whether he (the prosecutor) was first made aware of the cell phone and Bluetooth device the previous Thursday. She responded that was correct. The prosecutor then asked, "So there is no way I would have known about a cell phone or a head phone that was in your possession?" Defense counsel objected on relevance and speculation grounds and a side bar was held. During the sidebar, defense counsel argued the question implied that the defense had not provided timely discovery and therefore violated Evidence Code section 352. The prosecutor responded "I'm not asking for the instruction. It is not prejudicial. I have a right to know. They have a right to know. I didn't know about it until Thursday afternoon." The court overruled the objection. After the side bar, the following exchange occurred between the prosecutor and Carrillo:

“Q. Ms. Carrillo, I’ll rephrase the question: You’ve had this head phone and this cell phone that you claim to be Mr. Avilla’s since September of last year?

“A. Correct.

“Q. And you never called me? You’ve never had a duty to call me, but you’ve never called me and said, hey, look I have some things that belong to a defendant in your case, correct?

“A. Going back to your first question, the first time you and I spoke was on Thursday.

“Q. And I just want to clarify that with you. So prior to that date, I’d never seen a cell phone, head-phone or that log you’re referring to, correct?

“A. To my knowledge.”

#### 6. *Harbold*

Harbold testified for the defense that he had been friends with Avilla for 40 years. Harbold recalled speaking on the phone with Avilla on the day he was arrested. They spoke about getting together for lunch that day, but Harbold could not recall the time of the conversation. Harbold testified that, during the call, he heard sounds of struggling or fighting. He later heard someone tell Avilla to drop the knife and Avilla responded by telling that person to drop the rock. Next Harbold heard sirens, followed by “them talking about, empty your pockets and things.”

Harbold testified that he had spoken to Avilla while Avilla was in custody. Harbold said that Avilla never asked him to lie on the stand.

On cross-examination, Harbold testified that his children were adults and did not live with him.

The prosecution called Marconet as a rebuttal witness, who testified that he never told Avilla to empty his pockets. Rather, Marconet said he searched Avilla’s pockets himself because he had seen Avilla put what appeared to be a knife into his pocket prior to the arrest.

7. *Stipulation*

The parties stipulated that Avilla was on the phone at the time of the altercation with Trevino and Unciano. The court explained to the jury that the stipulation meant the parties had agreed that there was no dispute as to that issue, such that they had to accept it as a fact.

8. *Police Officer Hickey*

Hickey, a San Jose police officer, testified as a rebuttal witness for the prosecution. Hickey testified that he was on patrol with Marconet on August 23, 2011. After Avilla was arrested and read his *Miranda* rights, he made a statement to Hickey. According to Hickey, Avilla said he was going to steal a sandwich and soda but that he left them near the store entrance before exiting because someone was following him. Avilla did not mention being on the phone during the incident to Hickey.

An audio recording of Avilla's statement was played for the jury and admitted into evidence. In it, Avilla told Hickey he left everything in the cart inside the door to the Safeway because "I seen him lookin' at me" and it was not "worth goin' to jail over." Avilla claimed to have forgotten about the Kool-Aid in his pocket, which he maintained was "all [he] took," since he left everything else in the store. Avilla said he showed the men a "little straight razor with no blade in it" and that he took the Kool-Aid because "I got a friend of mine that lets me come over and sleep at his house every once in a while . . . and his kids like Kool-Aid. [¶] So I was gonna bring them some Kool-Aid so I could spend the night."

9. *Defense Investigator Norman*

Defense investigator Norman was called as a rebuttal witness by the prosecution. Norman testified that he interviewed Harbold in connection with Avilla's case. Harbold told Norman that he learned Avilla had been arrested when he spoke to Avilla from jail.

### ***C. Verdict, Sentencing, Appeal, and Writ***

On July 18, 2013 after deliberating for one day, the jury returned guilty verdicts on all six counts.

The court held a bench trial on the alleged priors. It found true allegations that Avilla had three prior strike convictions (§§ 667, subd. (b)-(i), 1170.12) and a prior serious felony conviction (§§ 667, subd. (a), 1192.7).

The court held a sentencing hearing on February 28, 2014. On count 1, the court sentenced Avilla to a term of 25 years to life plus a consecutive term of five years for the serious-felony prior (§ 667, subd. (a)(1)). The court imposed identical terms for counts 2 through 5, to run concurrently. Finally, the court imposed a 25-years-to-life term on count 6, which it stayed pursuant to section 654. Thus, Avilla was sentenced to a total unstayed prison term of 30 years to life.

Avilla timely appealed on March 4, 2014. He has also filed a petition for writ of habeas corpus, which we have denied by separate order.

## **II. DISCUSSION**

### ***A. Prosecutorial Misconduct***

Avilla raises eleven claims of prosecutorial misconduct. “ ‘The applicable federal and state standards regarding prosecutorial misconduct are well established. “ ‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘ “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ” [Citation.]’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

“[I]n order to preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection to the alleged misconduct and request the jury

be admonished to disregard it.” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1339 (*Seumanu*).) “The foregoing, however, is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile.” (*Hill, supra*, 17 Cal.4th at p. 820.)

*1. Argumentation During Opening Statement*

Avilla contends the prosecutor made unsupported and inflammatory remarks, which constituted improper argumentation, during his opening statement. Specifically, the prosecutor told jurors “what this case really boils down to and what this case is about [is] the defendant believes that laws that apply to the rest of us, don’t apply to him.” The trial court overruled defense counsel’s objection that the statement constituted argument. In short succession, the trial court sustained an argument objection and overruled another one, saying “I’ll remind you at this time that what [the prosecutor] is telling you is not evidence, this is what he anticipates his case is going to present. I mean, so he should not be arguing because he has not presented evidence. So I will give him some leeway to explain what he thinks this case is going to present.” Immediately thereafter, the prosecutor stated “So what the evidence will show in this particular case is that the defendant will take whatever he wants whenever he wants it, and he doesn’t care about inflicting serious injury on a couple of people just trying to do their job.” Defense counsel did not object.

“The purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution’s theory of the case.” (*People v. Millwee* (1998) 18 Cal.4th 96, 137.) “[S]tatements of personal belief, based on purported facts not in evidence,” are improper during opening statements. (*People v. Fosselman* (1983) 33 Cal.3d 572, 580.) It is likewise not “proper to appeal to the passions and prejudices of the jury” during opening statements. (*Seumanu, supra*, 61 Cal.4th at p. 1342.)

Comments “fairly based on evidence the prosecutor reasonably intend[s] to present” are permitted. (*Id.* at p. 1343.)

Defense counsel did not object to the prosecutor’s second statement, as required to preserve a claim of prosecutorial misconduct for appeal. (*Seumanu, supra*, 61 Cal.4th at p. 1339.) Avilla urges us nevertheless to reach his claim on the ground that an objection would have been futile. (*Hill, supra*, 17 Cal.4th at p. 820 [“A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile”].) Alternatively, he maintains defense counsel provided ineffective assistance of counsel by failing to object.

In our view, the prosecutor’s comments were fairly based on the evidence he intended to present, particularly Trevino and Unciano’s testimony regarding their encounter with Avilla. The prosecutor’s comments regarding Avilla’s state of mind constituted reasonable inferences from the evidence the prosecution intended to present related to the prosecution’s theory of the case—namely, that defendant did not act out of self-defense. Finding no prosecutorial misconduct, we need not consider whether Avilla forfeited his claim as to the second statement. Finally, because no prosecutorial misconduct occurred, the failure to object did not constitute ineffective assistance of counsel. (*People v. Lucas* (1995) 12 Cal.4th 415, 494 [“failure to object was not ineffective assistance of counsel, as no prejudicial prosecutorial misconduct occurred”].)

2. *Discussion of Witness Who Did Not Testify During Opening Statement*

During his opening statement, the prosecutor stated: “As [the loss prevention officers] are following the defendant, a good Samaritan, who you may or may not hear from, sees the commotion. What’s going on. And immediately identifies the situation and goes to help the los[s] prevention officers. [¶] As he’s following the defendant he’s trying to prevent the defendant from getting away before the police arrive, the defendant

does the same thing to him, swipes at him with his knife and threatens him with great bodily harm.”

The prosecutor was referring to Tutone, the alleged victim of one count of assault with a deadly weapon and one count of threats to commit a crime resulting in death or great bodily injury. At the preliminary hearing, Tutone testified that he observed the altercation between Avilla and the loss prevention associates and decided to “tag along” when Avilla fled in case he could help. Tutone testified that he came within two feet of Avilla, at which point Avilla “tried to swipe” at him with the knife. Tutone appeared at trial, but was not called as a prosecution witness. Trevino testified that a third person began following Avilla as he walked away from the Safeway, but Trevino did not see Avilla attempt to use a knife on that individual. Thus, no evidence was admitted that Avilla threatened Tutone, as the prosecutor stated in his opening.

Avilla argues the prosecutor improperly vouched for Tutone’s character by referring to him as a “good Samaritan.” Avilla further contends the prosecutor committed misconduct by referring to evidence he knew he might be unable to produce. Avilla notes that, on the morning of opening statements, the prosecutor told the court that Tutone had not appeared in court as promised. The prosecutor expressed concern about his ability to locate Tutone and requested that the court find him to be an unavailable witness under Evidence Code section 240. Before the court ruled on that request, the prosecutor informed it that Tutone was on his way, although the prosecutor declined to “make any absolute representation we’ve located him.” Opening statements began without any further discussion of Tutone.

The People assert Avilla forfeited any objection to the prosecutor’s discussion of Tutone by not objecting below. Avilla responds that it would have been futile for his counsel to object, given the court’s earlier statement that it would give the prosecutor “some leeway to explain what he thinks this case is going to present.” We disagree. The court made the “leeway” comment in response to repeated objections that the prosecutor

was engaging in improper argumentation in his opening. Whether the prosecutor would be able to produce Tutone was a separate issue on which the court had not ruled. Accordingly, we cannot conclude that an objection would have been futile. Therefore, Avilla forfeited his misconduct claim.

On appeal, Avilla claims his trial counsel rendered ineffective assistance by failing to object to the prosecutor's discussion of Tutone. We address that claim below at Part II.B.

### 3. *Cross-Examination of Defense Investigator Carrillo*

Defense investigator Carrillo testified that she retrieved Avilla's cell phone and Bluetooth device from the jail in September 2012. On cross-examination and over a defense objection, the prosecutor elicited testimony that Carrillo never called him to volunteer information about the devices. The prosecutor also elicited testimony from Carrillo that she showed him the devices for the first time a few days prior to testifying. Avilla contends the prosecutor committed misconduct by implying the defense provided late discovery, an implication that attacked the integrity of defense counsel.

Avilla's prosecutorial misconduct claim fails on the merits. "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*Hill, supra*, 17 Cal.4th at p. 832.) When a claim of prosecutorial misconduct focuses on the prosecutor's questions or comments before the jury, " " "the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." ' ' ' (*People v. Shazier* (2014) 60 Cal.4th 109, 144.)

Here, the record does not support the conclusion that there is a *reasonable likelihood* jurors understood the prosecutor's questions to Carrillo as impugning the integrity of defense counsel. The prosecutor's line of questioning was part of a larger

strategy in which he implied that defense witnesses—including Carrillo, Avilla, and Harbold—were lying about Avilla using a Bluetooth device during the incident. That theory found support in evidence that Avilla’s jail property sheet did not list a Bluetooth device and Avilla did not mention being on the phone with Harbold during his initial interview with police. “[T]he prosecutor was entitled to challenge [Carrillo’s] credibility” (*People v. Dykes* (2009) 46 Cal.4th 731, 769 (*Dykes*)) by showing she did not approach authorities with exculpatory evidence. (*People v. Tauber* (1996) 49 Cal.App.4th 518, 524-525 [“the fact a witness is aware of the potentially exculpatory nature of facts but fails to reveal that evidence to the authorities before trial is relevant to the witness’s credibility. While there may be no legal obligation to come forward, it is so natural to do so that the failure to promptly present that evidence makes suspect its later presentation at trial”].) Defense counsel was free to rehabilitate Carrillo’s credibility by, for example, asking whether it is her practice to discuss evidence with the prosecutor where she is employed by the defense. Presumably it is not. “The prosecutor’s [questions] did not suggest that defense counsel had participated in fabricating a defense for defendant, nor did it constitute a personal attack upon counsel or counsel’s credibility.” (*Dykes, supra*, 46 Cal.4th at p. 769.) Accordingly, we find no misconduct.

#### 4. *Mischaracterization of Law in Rebuttal Closing*

Defense counsel argued in closing that “[t]he government can charge any person within its jurisdiction with anything they want, if they believe they’ve the evidence to prove it[,] . . . [but] that doesn’t mean . . . that [the individual charged is] . . . automatically guilty. You have the final say.” The prosecutor responded, in his rebuttal closing argument, that “the duty of the people is to file charges that they can prove beyond a reasonable doubt. In order to stand trial and be with a jury of 12 people, there is the preliminary hearing. We heard about that preliminary hearing with evidence put in front of the judge, witnesses testif[y,] and the court has to make a determination that probable cause existed. Meaning, the defendant committed the crime. And probably

committed the crime and it was probably [*sic*] this defendant committed the crime. . . . [¶] This evidence has been vetted. The Court has heard this evidence and determined probable cause exists. So that is a fallacy to say we can do whatever we want.”

Avilla argues the prosecutor’s statements misstated the law about both a prosecutor’s duty and the purpose of the preliminary hearing. He further maintains the comments constituted misconduct because, in them, the prosecutor implied that the court had already determined defendant’s guilt.

Avilla did not object to the prosecutor’s argument below. For the first time in reply, Avilla contends he has not forfeited his prosecutorial misconduct claim based on that argument because an admonishment would not have cured the harm. “Generally, the raising of a new ground for the first time in a reply brief is not proper appellate practice.” (*Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal.App.4th 379, 388-389.) Therefore, we decline to consider Avilla’s argument, and conclude he forfeited the claim. (*Ibid.*) We address his contention that his trial counsel rendered ineffective assistance by failing to object to the prosecutor’s comments below at Part II.B.

Avilla also forfeited his seven remaining prosecutorial misconduct claims by not objecting below. (*Hill, supra*, 17 Cal.4th at p. 820.) He makes no attempt to claim an exception to the forfeiture rule applies as to those claims, arguing instead that his trial counsel rendered ineffective assistance by failing to object. We address his ineffective assistance of counsel claims below.

***B. Ineffective Assistance of Counsel***

Avilla contends that his trial counsel’s representation fell below the standards for effective assistance because his counsel failed to object to many of the alleged incidents of prosecutorial misconduct.

## 1. *Legal Principles*

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel’s performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The deficient performance component of an ineffective assistance of counsel claim requires a showing that “counsel’s representation fell below an objective standard of reasonableness” “under prevailing professional norms.” (*Id.* at p. 688.) With respect to prejudice, a defendant must show “there is a reasonable probability”—meaning “a probability sufficient to undermine confidence in the outcome”—“that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Id.* at p. 694.) We “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” (*Id.* at p. 697.)

## 2. *Failure to Object to Alleged Instances of Prosecutorial Misconduct*

### a. *Discussion of Tutone in Opening Statement*

Avilla maintains trial counsel rendered ineffective assistance by not objecting when the prosecutor referenced Tutone’s potential testimony in his opening statement. As noted above, the prosecutor had expressed doubt about his ability to produce Tutone shortly before opening statements. Ultimately, Tutone appeared but was not called as a witness.

Assuming the prosecutor committed misconduct, such that counsel’s representation was deficient, defendant’s ineffective assistance of counsel claim fails because he has failed to show prejudice. Avilla argues the prosecutor’s statements were

prejudicial because they suggested the existence of an additional victim. He does not explain how or why the outcome of the case would have been different absent the implication that there were three victims, rather than two.

We are not persuaded there is a reasonable probability of a different result but for defense counsel's failure to object. The jury was instructed that the prosecutor's opening statement did not constitute evidence. Therefore, " '[a]ny inconsistency between the opening statement and the evidence was inconsequential. [Defendant] was permitted to confront all witnesses and to challenge and rebut all evidence offered against him. Under these circumstances, [defendant] suffered no conceivable prejudice.' " (*Dykes, supra*, 46 Cal.4th at p. 762, quoting *People v. Wrest* (1992) 3 Cal.4th 1088, 1109.) Given that lack of prejudice, Avilla's ineffectiveness claim fails.

*b. Mischaracterization of Law in Rebuttal Closing*

As discussed above, Avilla contends the prosecutor committed misconduct in his rebuttal closing argument by stating that "the duty of the people is to file charges that they can prove beyond a reasonable doubt" and by assuring jurors that the evidence had been "vetted" by the court at the preliminary hearing, after which it determined that "the defendant committed the crime" or "probably committed the crime." Accordingly to Avilla, these comments misstated the law and tended to absolve the prosecution of its burden to prove each element of each charge beyond a reasonable doubt.

A prosecutor is not permitted to invite the jury to convict based on his or her opinion of guilt and on the prestige of his or her office. (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1585.) Nor is it appropriate for a prosecutor to suggest that a conviction is required based on an assessment of the evidence by a grand jury or a court. (*People v. Edgar* (1917) 34 Cal.App. 459, 467 [prosecutor committed misconduct by arguing that the jury should believe the victim because "[n]ineteen men of this county acting upon their oaths as grand jurors heard her story, and believed it . . ."]; *People v. Wayne* (1953) 41 Cal.2d 814, 828-829 [prosecutor's suggestion that jurors " 'keep in

mind that at the Grand Jury hearing they heard . . . witnesses testify . . . and the indictment was returned by a responsible group of citizens who believed the evidence showed that [the defendant] had committed the crimes charged’ ” deemed “improper”), overruled on another ground in *People v. Snyder* (1958) 50 Cal.2d 190.) “When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]’ ” (*People v. Centeno* (2014) 60 Cal.4th 659, 667 (*Centeno*)). “If the challenged comments, viewed in context, ‘would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.’ ” (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) “ ‘[W]e “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ ” (*Centeno, supra*, at p. 667.)

Applying these principles, we find no misconduct. The prosecutor’s comments were made in response to an argument defense counsel advanced in his closing: that “[t]he government can charge any person within its jurisdiction with anything they want, if they believe they’ve the evidence to prove it.” The prosecutor responded: “the duty of the people is to file charges that they can prove beyond a reasonable doubt. In order to stand trial and be with a jury of 12 people, there is the preliminary hearing. We heard about that preliminary hearing with evidence put in front of the judge, witnesses testif[y,] and the court has to make a determination that probable cause existed. Meaning, the defendant committed the crime. And probably committed the crime and it was probably [sic] this defendant committed the crime. . . . [¶] This evidence has been vetted. The Court has heard this evidence and determined probable cause exists. So that is a fallacy to say we can do whatever we want.” Given that context, we find no reasonable likelihood that the jurors understood the prosecutor to be urging them to consider his opinion or the outcome of the preliminary hearing in rendering their verdict.

Jurors were instructed that the People had the burden to prove defendant's guilt beyond a reasonable doubt and that the fact that a criminal charge had been filed against the defendant was not evidence that the charge was true. They were further instructed to follow the law as explained by the judge, even if the attorneys' comments on the law conflicted with the instructions. We assume the jurors understood and faithfully followed those instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) In light of those instructions, we find no reasonable likelihood that the jurors construed the complained-of statements as shifting the burden of proof to defendant.

For the foregoing reasons, we conclude Avilla failed to "establish either misconduct or, it follows, ineffective assistance of counsel." (*People v. Marshall* (1996) 13 Cal.4th 799, 832.)

*c. Cross-Examination of Defendant*

Avilla asserts his trial counsel rendered ineffective assistance by failing to object when the prosecutor asked him on cross-examination whether he previously had informed the prosecutor about the Bluetooth device or his conversation with Harbold. Avilla maintains those questions violated his right to counsel under the Sixth Amendment and implied the defense had shirked an obligation to inform the prosecutor about certain evidence.

Even assuming the prosecutor's questions constituted misconduct and Avilla's counsel had no valid tactical reason for failing to object and request an admonition, Avilla's ineffective assistance of counsel claim must be rejected because he has failed to demonstrate prejudice. Under *Strickland*, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, 466 U.S. at p. 694.) On appeal, Avilla puts forth no argument as to how an objection to the prosecutor's questions would have helped his cause. Because he does not explain how an objection would have led to a

different result, he has failed to satisfy his affirmative burden on appeal of demonstrating prejudice.

*d. Comments in Closing Related to the Bluetooth Device*

During his closing argument, the prosecutor made statements apparently designed to cast doubt on the veracity of Avilla's claim that he did not hear Trevino identify himself as a loss prevention associate because he was speaking with Harbold on a Bluetooth headset. In particular, the prosecutor said "I was fooled, and I did not know about these things [(the cell phone and Bluetooth device)]" and "[Avilla] fooled me about the head phones, about his cell phone." The prosecutor also noted that Avilla did not mention the Bluetooth or Harbold in his initial statement to the police, stating: "[Avilla] told the police he knew loss prevention officers were watching him. No mention of the Bluetooth. Didn't know they were trying to stop him. Wow. Never told the police about any witness. And all of a sudden we have a mystery witness . . . show up. Remarkable." Finally, the prosecutor stated that "prior to Thursday no one knew about the existence of [the Bluetooth device]." According to Avilla, these comments " '[cast] uncalled for aspersions on defense counsel,' " improperly implied that defense counsel had fabricated evidence, or otherwise to portrayed defense counsel as the villain in the case. Avilla says his trial counsel rendered ineffective assistance by failing to object to the prosecutor's statements.

"Whether to object at trial is among 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1202 (*Riel*)). Our supreme court has cautioned us against " ' "second-guess[ing] reasonable, if difficult, tactical decisions in the harsh light of hindsight." ' " (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) Accordingly, in examining a claim of ineffective assistance of counsel, " ' "[w]e accord great deference to counsel's tactical decisions . . . ." ' " (*Ibid.*)

We conclude that not objecting was a reasonable tactical decision within the “ ‘ “wide range of reasonable professional assistance.” ’ ” (*People v. Weaver* (2001) 26 Cal.4th 876, 925.) As the prosecutor’s own witness, Marconet, testified, Avilla’s jail booking sheet indicated that he had a cell phone at the time of his arrest. There also was undisputed evidence, in the form of a stipulation, that Avilla was on the phone at the time of the altercation with Trevino and Unciano. Defense counsel may reasonably have concluded that, in view of that evidence, jurors would believe the prosecutor should have been aware of and investigated Avilla’s cell phone call, such that his self-professed surprise was due to his own poor preparation. Because we cannot second-guess trial counsel’s reasonable tactical decision, we must reject Avilla’s ineffective assistance of counsel claim.

*e. Attempt to Corroborate Witness Testimony in Closing*

The prosecutor told jurors in his closing that Trevino and Unciano had consistently told the same story “at the scene to the police . . . at the preliminary hearing, and . . . at trial.” Neither the police report nor preliminary hearing testimony was admitted at trial. Nevertheless, the prosecutor assured jurors that Trevino and Unciano’s story must not have changed because defense counsel would have pointed out any resulting inconsistencies. Avilla argues his counsel was ineffective in failing to object to the foregoing statements, which Avilla says improperly argued facts not in evidence (the police report and the preliminary hearing testimony) and vouched for Trevino and Unciano’s credibility.

The prosecutor is permitted to comment on the state of the evidence, including the failure of the defense to introduce certain evidence. (See *People v. Kaurish* (1990) 52 Cal.3d 648, 680; *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1370.) By contrast, “attempt[s] to bolster a witness by reference to facts *outside* the record” constitutes “improper ‘vouching.’ ” (*People v. Medina* (1995) 11 Cal.4th 694, 757.) In other words, “ ‘[i]mpermissible “vouching” may occur where the prosecutor . . . suggests that

information not presented to the jury supports [a] witness's testimony.' ” (*People v. Williams* (1997) 16 Cal.4th 153, 257.)

When the prosecutor's comments are read in context<sup>3</sup>, it is clear that he did not improperly vouch for Trevino and Unciano's credibility by assuring jurors evidence that was not presented—the police report and preliminary hearing transcript—corroborated their testimony. Rather, he commented on the lack of impeachment evidence and encouraged jurors to draw a reasonable inference from that lack of evidence—namely, that Trevino and Unciano's story had remained consistent. Because we conclude there was no prosecutorial misconduct warranting a defense objection, we must reject Avilla's ineffective assistance of counsel claim. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463 [“Representation does not become deficient for failing to make meritless objections.”]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1038 (*Cunningham*) [failure to object to claimed prosecutorial misconduct is not ineffective assistance of counsel when there was no misconduct].)

*f. Mischaracterization of Avilla's Testimony in Closing*

In his closing argument, the prosecutor summarized Avilla's testimony as follows: “On the stand, this is what he told us: stole property, not his own. At some point after he took the knife out, *he knew that the loss prevention officers were trying to recover the stolen property, remember that?* [¶] Yeah, yeah, it was a big scuffle and we broke it up. I can't lie to you[,] at that point, *I knew that they were loss prevention officers.*” (Italics

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<sup>3</sup> The prosecutor stated: “Let's consider [the two loss prevention officers'] testimony. They told the same thing at the scene to the police, they said the same thing happened at the preliminary hearing, and they told you the same thing at trial. [¶] How do we know that? Because at each of these instances there is a defense attorney sitting there at the preliminary hearing. If they said something different, you can be sure that it would have been pointed out. And there was nothing pointed out that was inconsistent with these victims' statements. [¶] They didn't tell you one thing today, another thing the day before and something different to the police. Why was that? Because it didn't happen. There is one version of the truth. [¶] What they told you, you can see on the video.”

added.) Avilla contends the prosecutor mischaracterized his testimony, in which he equivocated as to whether he understood the men to be loss prevention. Avilla argues his counsel was ineffective for not objecting to that mischaracterization.

It is misconduct for a prosecutor to mischaracterize evidence during closing argument. (*People v. Valdez* (2004) 32 Cal.4th 73, 133-134.) But here the prosecutor did not mischaracterize Avilla's testimony. On direct examination, Avilla acknowledged that he became aware that Trevino and Unciano were loss prevention associates when Trevino displayed his badge after the initial altercation. While Avilla subsequently retreated, suggesting that he remained uncertain about the men's identities, we do not view the prosecutor's characterization as inaccurate.<sup>4</sup> In any case, even if we did reach that conclusion, the prosecutor's comments could have caused no prejudice. That is because Avilla's own counsel stated in his closing that "Mr. Avilla told you he became sure this [was] loss prevention" when Trevino held up his badge after the struggle. On appeal, Avilla does not object to that characterization by defense counsel. In these circumstances, the prosecutor did not commit prejudicial misconduct.

*g. Failure to Object to CALCRIM No. 3472 or  
Mischaracterization of CALCRIM No. 3472 During Closing*

The court instructed the jury regarding contrived self-defense with CALCRIM No. 3472, stating "[a] person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." In closing, the prosecutor stated: "The law says 3472, self[-]defense may not be contrived. . . . [¶] A person does not have the right to claim a self[-]defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force. [¶] When you go and steal

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<sup>4</sup> Specifically, Avilla testified "I didn't really know that they were loss prevention"; "I realized they may be loss prevention after the initial conflict"; "I did see the badge [after we separated]. I'm not going to lie and say I didn't, I did. . . . [¶] [a]t that point I could say that I had an idea they were loss prevention officers"; and "I had an . . . inkling" they were loss prevention.

something, the loss prevention officers use reasonable force to detain you, doesn't mean that you can fight back using self[-]defense. [¶] The law tells you that, you cannot be contrived. We have a social contract, when we walk down the street and we have a fruit stand and there is a bushel of apples, it is not anyone walking by can pick up that apple and walk away with it, that's not the way the law works. You can't steal it and then say, well, I had to use a knife because I'm going to claim self[-]defense. The law is black and white. You can't start it by stealing something and when someone tries to take that property back, you can't say I'm using self[-]defense."

On appeal, Avilla argues his trial counsel rendered ineffective assistance by failing to object to the contrived self-defense instruction, which he says was not supported by the evidence. He further contends his trial counsel was ineffective by failing to object to the prosecutor's characterization of that instruction in closing arguments.

We begin with the instruction itself. "A party is entitled to a requested instruction if it is supported by substantial evidence. [Citation.] Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] At the same time, instructions *not* supported by substantial evidence should not be given. [Citation.] 'It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]' " (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.)

Here, Trevino testified that Avilla initiated the physical confrontation by pushing him "immediately" after Trevino identified himself. Based on that evidence, the jury reasonably could have concluded that Avilla provoked the fight. Therefore, CALCRIM No. 3472 was supported by substantial evidence and defense counsel did not render ineffective assistance by failing to object to it.

Next, we consider the prosecutor's characterization of CALCRIM No. 3472. He argued that CALCRIM No. 3472 stands for the following propositions: "When you go

and steal something, the loss prevention officers use reasonable force to detain you, doesn't mean that you can fight back using self-defense. . . . You can't start it by stealing something and when someone tries to take the property back, you can't say I'm using self[-]defense." Thus, the prosecutor took the position that one can contrive self-defense by stealing. The People appear to disagree, stating that CALCRIM No. 3472 "had little application" and would have to be "strained to fit the facts of the case . . . ." But, regardless of whether the prosecutor's comments properly explained CALCRIM No. 3472, the more apt question is whether he misstated the law.

"A citizen may arrest another if a felony has in fact been committed and he has reasonable cause to believe that the person to be arrested committed it." (*People v. Fosselman* (1983) 33 Cal.3d 572, 579.) "[T]here is no right to 'defend' against a valid [citizen's] arrest." (*Ibid.*) Therefore, the prosecutor properly characterized the applicable law when he told jurors: "When you go and steal something, the loss prevention officers *use reasonable force* to detain you, doesn't mean that you can fight back using self[-]defense." (Italics added.)

There is, however, a "right to resist excessive force used to make an arrest." (*People v. Adams* (2009) 176 Cal.App.4th 946, 953.) A person may use reasonable force to protect himself against the use of unreasonable excessive force in making an arrest. (*People v. Soto* (1969) 276 Cal.App.2d 81, 85.) To the extent the prosecutor suggested a thief can *never* use self-defense against one trying to arrest him by stating "[y]ou can't start it by stealing something and when someone tries to take the property back, you can't say I'm using self-defense," he misstated the law.

We nevertheless find no misconduct because, in the context of the prosecutor's whole argument and the instructions, there is no reasonable likelihood that jurors understood the prosecutor's statement to mean Avilla was not entitled to self-defense and applied it in that manner. As noted, while one isolated portion of the prosecutor's argument could be understood to mean Avilla could not claim self-defense, the

prosecutor also correctly stated the law: a thief cannot use self-defense against loss prevention associates using reasonable force to detain him or her. Jurors were specifically instructed that “[s]elf-defense is a defense to Robbery in the Second Degree as charged in Counts 1 and 2, to Assault with a Deadly Weapon as charged in Count 3 and to the lesser included offenses of Simple Battery and Simple Assault.” And they were instructed to follow the court’s instructions over conflicting statements from the attorneys. We presume jurors followed the instructions over the prosecutor’s argument, treating the latter “ ‘as words spoken by an advocate in an attempt to persuade.’ ” (*People v. Osband* (1996) 13 Cal.4th 622, 717.) As such, Avilla has not established misconduct.<sup>5</sup> And absent misconduct, there can be no ineffective assistance. (*Cunningham, supra*, 25 Cal.4th at p. 1038 [failure to object to claimed prosecutorial misconduct is not ineffective assistance of counsel when there was no misconduct].)

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<sup>5</sup> *People v. Ramirez* (2015) 233 Cal. App.4th 940 (*Ramirez*), which Avilla cites in his reply brief and counsel addressed at oral argument, is distinguishable. There, two codefendants provoked a fistfight with rival gang members. (*Id.* at p. 944.) One of the defendants fatally shot a rival. He claimed to have done so in self-defense because the rival drew a gun. The trial court instructed the jury with CALCRIM Nos. 3471 and 3472. (*Ramirez, supra*, at pp. 945, 946.) During closing argument, the prosecutor argued that defendants had forfeited any claim of self-defense by using nondeadly force to start the fight, regardless of whether the victim escalated the conflict to a deadly one. (*Id.* at p. 947.) The prosecutor argued in no uncertain terms that “if [the defendants] . . . intend[ed] to provoke a fight and use force . . . [, then] they are not entitled to [use self-defense].” (*Id.* at p. 946.) She “stress[ed]” that “it [didn’t] matter” whether the victim escalated the conflict to a deadly one. (*Ibid.*) She “repeatedly emphasized” that argument, which misstated the law. (*Id.* at p. 950.) A divided panel of Division Three of the Fourth Appellate District reversed.

Here, in stark contrast to *Ramirez*, a brief portion of the prosecutor’s argument could—in isolation—be understood to mean Avilla could not claim self-defense. But in the context of the prosecutor’s whole argument and the instructions, we find no reasonable likelihood that jurors understood the prosecutor to be saying defendant forfeited his right to self-defense. Thus, *Ramirez* has no application.

*h. Mischaracterization of Facts and CALCRIM No. 3470  
During Closing*

Jurors were instructed with CALCRIM No. 3470. Among other things, that instruction provides “[t]he defendant acted in lawful self-defense if: [¶] One, the defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully. [¶] Two, the defendant reasonably believed that the immediate use of force was necessary to defend against that danger. [¶] And, three, the defendant used no more force than was reasonably necessary to defend against that danger.”

In closing, the prosecutor stated: “Think about the danger in this particular case. It has been testified to, it is on video. Loss prevention officers they are actually reaching for that bag. . . . [¶] The second one, is holding him, restraining him. We have had no punches thrown, we’ve had no weapons used. We didn’t have two people ganging up on him, and even if that was the case, you can’t escalate it to deadly force. It’s reasonable use of force. What does that mean? Someone is pushing me or restraining me, I can push them back. Someone is punching me, I can punch them back. It does not mean I can bring a knife to a gun fight and say self defense.” Avilla maintains his trial counsel rendered ineffective assistance by failing to object to the foregoing comments, which he says contained factual and legal misstatements.

Factually, Avilla contends it was inaccurate to say he used deadly force because, at worst, the evidence shows he swung the knife at a distance of two and a half to three feet from Unciano. Deadly force has been defined to mean “[v]iolent action known to create a substantial risk of causing death or serious bodily harm.” (FORCE, Black’s Law Dict. (10th ed. 2014) p. 760.) In our view, there can be no doubt that swinging a knife in close proximity to another creates a substantial risk of causing death or serious bodily harm. Accordingly, we conclude the prosecutor’s reference to deadly force found support in the evidence.

Avilla further complains that it was factually inaccurate for the prosecutor to state that no punches were thrown, given that Trevino kicked him. The prosecutor's statement, while technically accurate, may have downplayed the amount of force the loss prevention associates used on Avilla. But even if the prosecutor committed misconduct, we conclude defense counsel's failure to object did not constitute ineffective assistance. As noted, "[w]hether to object at trial is among 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle.' " (*Riel, supra*, 22 Cal.4th at p. 1202.) Here, rather than objecting, defense counsel played the surveillance video showing Trevino kick Avilla during his own closing argument. We cannot second-guess that tactical decision at this stage. Moreover, because jurors saw Trevino kick Avilla on the video, there is no reasonable probability that the result of the trial would have been different had defense counsel objected to the arguably misleading statement that "no punches [were] thrown."

Finally, according to Avilla, the prosecutor misstated the law of self-defense by characterizing the amount of force one is permitted to use in defending one's self as equal to the force being used by one's aggressor — "[s]omeone is pushing me or restraining me, I can push them back[; s]omeone is punching me, I can punch them back." We find no reasonable likelihood that the jury understood or applied the complained-of comments to mean Avilla acted in self-defense only if he responded by kicking and restraining the loss prevention associates, as they did to him. (*Dykes, supra*, 46 Cal.4th at p. 772.) Jurors were instructed on the law of self-defense and that, to the extent the law as given by the trial court conflicted with the description of the law as given by the attorneys, they were to follow the court's instructions. Finding no reasonable likelihood jurors were misled as to the law of self-defense by the prosecutor's argument, we conclude Avilla failed to establish prosecutorial misconduct. For the same reason, he cannot show a reasonable probability of a different trial outcome had his counsel objected to the prosecutor's argument, as required to establish ineffective assistance of counsel.

*i. Closing Argument Reference to Harbold's Children*

The prosecutor insinuated in his closing argument that Avilla lied to the police about why he had stolen the Kool-Aid (i.e., to give to his friend's children) because Harbold testified his children were grown. That insinuation relied on the assumption that Harbold was the friend to whose children Avilla intended to give the Kool-Aid. Avilla maintains the prosecutor improperly assumed facts not in evidence because there was no evidence that Avilla was referring to Harbold's children when he told police he took the Kool-Aid for the children of "a friend of mine that lets me come over and sleep at his house every once in a while."

"Although it is misconduct to misstate facts, the prosecutor 'enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom.' " (*People v. Collins* (2010) 49 Cal.4th 175, 230.) We agree with the People that one could reasonably infer from Harbold's testimony that Avilla was planning to come over on the evening he was arrested that Avilla was referring to Harbold when he told police of his plan for that night. Accordingly, Avilla has not established misconduct to which effective trial counsel would have objected. Nor has he established prejudice, given the abundance of other evidence undermining his credibility.<sup>6</sup>

*j. Cumulative Error*

Avilla contends the cumulative effect of the alleged acts of prosecutorial misconduct was to deprive him of his right to due process. "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result

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<sup>6</sup> That evidence included Avilla's convictions for giving a false name to a police officer and filing a false police report. Avilla's own testimony also evinced his dishonesty, as he contradicted his initial statement to police. Specifically, Avilla told police he left all of the items but the Kool-Aid in the store; he admitted on the stand to removing them from the store. Avilla told police he brandished a bladeless straight razor; he admitted at trial that it was a knife.

more favorable to defendant in their absence.’ ” (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.) “The ‘litmus test’ for cumulative error ‘is whether defendant received due process and a fair trial.’ ” (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

We have assumed three instances of misconduct—the prosecutor’s reference to Tutone in his opening statement, the prosecutor’s questions on cross-examination suggesting Avilla failed to inform the prosecution about the Bluetooth device and his call with Harbold, and the prosecutor’s arguably misleading description of the fight in closing. These assumed errors were harmless under any standard, whether considered individually or collectively. (*Williams, supra*, 170 Cal.App.4th at p. 646.)

***C. Jury Instructions – Self-Defense as Defense to Criminal Threats Charge***

The trial court denied Avilla’s request to instruct the jury on self-defense as a defense to the criminal threats charges. In declining to give the instruction, the court reasoned that there was no evidence supporting such a defense other than Avilla’s “own self-serving statements.”

A court has a duty to instruct on defenses where there is substantial evidence to support the defense and it is not inconsistent with defendant’s theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157; *People v. Maury* (2003) 30 Cal.4th 342, 424.) Substantial evidence is sufficient evidence on which a “reasonable [jury] could conclude the particular facts underlying the instruction existed.” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

Assuming the trial court erred in failing to instruct the jury on self-defense as a defense to the criminal threats charges, that error was harmless beyond a reasonable doubt. (*People v. Salas* (2006) 37 Cal.4th 967, 984 [noting court has not determined what test of prejudice applies to the failure to instruct on an affirmative defense and applying *Chapman v. California* (1967) 386 U.S. 18 beyond a reasonable doubt standard].) The jury rejected Avilla’s claim of self-defense as to the other counts, and

there is no reason to believe it would not have done the same with respect to the criminal threats count. Avilla concedes as much, arguing that the failure to instruct was prejudicial only in light of “the prosecutor’s misconduct in misstating the law as to self-defense.” As we have found no such prosecutorial misconduct, we conclude the failure to instruct was not prejudicial.

***D. Sufficiency of the Evidence Supporting Conviction for Assault With a Deadly Weapon***

Avilla raises two sufficiency of the evidence challenges to his conviction for assault with a deadly weapon (§ 245, subd. (a)(1)). He contends there was neither sufficient evidence that he committed an assault, nor sufficient evidence that he used a deadly weapon.

***1. Standard of Review***

“ ‘When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] ‘[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citations.] ‘[I]t is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt.’ [Citation.]” (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289-1290, fn. omitted.)

***2. Substantive Law***

Section 245, subdivision (a)(1) punishes “assault upon the person of another with a deadly weapon or instrument other than a firearm . . . .” “[T]he criminal intent which is required for assault with a deadly weapon . . . is the general intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed

would be the injury to another.” (*People v. Rocha* (1971) 3 Cal.3d 893, 899; *People v. Williams* (2001) 26 Cal.4th 779, 787-788 [mental state required for assault is intent to commit an act the direct, natural, and probable consequence of which is battery].)

“[A]ssault does not require a specific intent to injure the victim.” (*People v. Wyatt* (2010) 48 Cal.4th 776, 780.) Thus, “a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery.” (*People v. Williams, supra*, at p. 788, fn. 3.)

For purposes of section 245, subdivision (a)(1), “a ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ ” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029 (*Aguilar*).) “Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.” (*Id.* at p. 1029.)

### 3. *Analysis*

Avilla’s first contention is that there was insufficient evidence of his criminal intent because he did not commit an act the direct, natural and probable consequence of which was the application of force on another person. According to Avilla, swinging a pocket-knife at a distance of two and a half to three feet from the torso of another person, as Unciano testified Avilla did, will not directly, naturally, and probably result in a battery or injury to another. We disagree. In our view, a reasonable person would reasonably believe that swinging a knife in the direction of, and in close proximity to, another person would directly, naturally, and probably result in a battery.

Avilla next claims there was insufficient evidence that the pocket knife constituted a deadly weapon. He notes, correctly, that pocket knives have not been held to be per se deadly weapons, given they have nondangerous uses. (*People v. Burton* (2006) 143 Cal.App.4th 447, 457.) Thus, the prosecution was required to show he used the pocket knife in a manner likely to produce death or great bodily injury. (*Aguilar, supra*, 16 Cal.4th at p. 1029.) We conclude that evidence Avilla swung the open pocket knife at Unciano, with the tip passing within a few feet of Unciano's chest, supports the jury's finding that Avilla used a deadly weapon. (See *People v. Simons* (1996) 42 Cal.App.4th 1100, 1106-1107 [evidence that defendant waved screwdriver at officers to keep them at bay held sufficient to support finding that the screwdriver was used as a deadly weapon]; *In re D.T.* (2015) 237 Cal.App.4th 693, 699 ["multiple California courts have affirmed convictions under Penal Code section 245, subdivision (a)(1), when the deadly weapon used was 'some hard, sharp, pointy thing that was used only to threaten, and not actually used to stab' "].) In sum, there was sufficient evidence to support Avilla's conviction for assault with a deadly weapon.

#### ***E. Section 654***

Avilla asserts the court's failure to stay punishment on counts 3, 4, and 5 (assault with a deadly weapon and two counts of criminal threats) violated section 654's proscription against multiple punishment.

##### ***1. Legal Principles and Standard of Review***

Section 654 provides, in relevant part, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "[I]t is well settled that section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] Whether a course of

conduct is indivisible depends upon the intent and objective of the actor.” (*People v. Perez* (1979) 23 Cal.3d 545, 551 (*Perez*).) If all the offenses were incident to one objective, the defendant may not be punished for more than one. Thus, a defendant who attempts murder by setting fire to the victim’s bedroom may not be punished for both arson and attempted murder, because his primary objective was to kill, and the arson was the means of accomplishing that objective and thus merely incidental to it. (*Ibid.*) “On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct.” (*Ibid.*) For example, the objectives to drive while intoxicated and to drive with a suspended license were separately punishable, though they occurred simultaneously. (*Id.* at p. 552.) The purpose of the protection against multiple punishments is to insure that the defendant’s punishment will be commensurate with his criminal culpability. (*Id.* at p. 552, fn. 4.)

Whether a defendant’s multiple crimes involved multiple objectives generally is a question of fact for the sentencing court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Where, as here, the trial court makes no express findings on the issue, its imposition of separate sentence terms may constitute an implied finding that the offenses were divisible. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.) “A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.” (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

While Avilla did not object below, as the People concede, “the waiver doctrine does not apply to questions involving the applicability of section 654. Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was

raised by objection in the trial court or assigned as error on appeal.” (*Perez, supra*, 23 Cal.3d at p. 550, fn. 3.)

## 2. *Analysis*

Avilla maintains a single course of conduct with a single objective—stealing—gave rise to his convictions for robbery, assault with a deadly weapon, and criminal threats. Specifically, he contends he brandished the knife and verbally threatened Trevino and Unciano as the means of perpetrating the robberies. The People concede “the case is a close one,” but argue there was no error because Avilla had committed the robberies at the moment he resisted Trevino, which was before he pulled the knife or made the threats. The People do not speculate as to what separate intent or objective Avilla may have had when he threatened Trevino and Unciano and brandished the knife.

Section 654 applies where one criminal act is committed to accomplish another. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191 (*Nguyen*).) For example, “if an assault is committed as the means of perpetrating a robbery, section 654 requires the sentence for the assault to be stayed.” (*In re Jesse F.* (1982) 137 Cal.App.3d 164, 171.) By contrast, “[w]hen there is an assault *after* the fruits of the robbery have been obtained, and the assault is committed with an intent other than to effectuate the robbery, it is separately punishable.” (*Ibid.*) The same reasoning applies to threats. Section 654 applies where a threat is uttered in order to complete a robbery, but not where a separate objective motivates the threat.

Here, Avilla took out his knife while Unciano had him in a bear hug in an attempt to prevent him from stealing the food in his backpack. Avilla then swung the knife at Unciano and threatened both men with death if they did not “back off.” When they did, Avilla left with the stolen items. In view of the foregoing facts, we conclude that Avilla perpetrated both the threats and the assault in order to “neutralize[] . . . resistance by the victims,” Trevino and Unciano, and accomplish the robbery. (*Nguyen, supra*, 204 Cal.App.3d at p. 191.) There is no evidence he harbored any separate intent.

Accordingly, we conclude the court erred by not staying the sentences for assault with a deadly weapon and criminal threats under section 654.

***F. Three Strikes Sentence on Count 6***

“Prior to its amendment by [the Three Strikes Reform Act of 2012 (Proposition 36 or the Act)], the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent. [Citations.] The Act amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony, pursuant to the provisions that apply when a defendant has one prior conviction for a serious or violent felony.” (*People v. Johnson* (2015) 61 Cal.4th 674, 680-681 (*Johnson*), fn. omitted.) An exception requiring a third strike sentence exists where the prosecution pleads and proves that, “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

Avilla was convicted and sentenced after Proposition 36’s November 7, 2012 effective date. (*Johnson, supra*, 61 Cal.4th at p. 679.) Because second degree burglary in violation of sections 459 and 460 is not a serious or violent felony under section 1170.12, subdivision (c)(2)(A), Avilla contends that he should not have received a third strike sentence on his count 6 conviction. The People respond that Avilla “may be correct,” but note that “there may have been factors [to which] the prosecutor could have pointed to justify the longer term, had he known the necessity to do so.” However, no such factors were pleaded and proved. On remand, the trial court is directed to resentence Avilla on count 6 in accordance with Proposition 36.

### **III. DISPOSITION**

The judgment is reversed and the matter is remanded for resentencing. On remand, the trial court is directed to stay pursuant to Penal Code section 654 the concurrent terms imposed for counts 3, 4, and 5 and to impose a lawful sentence for count 6.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.